

APPENDIX C

267 F.Supp.2d 718

United States District Court,
E.D. Michigan,
Southern Division.

Daniel A. SCHMITT, Plaintiff,

v.

CITY OF DETROIT, Loretta Neal, Mark Vann, James
Florkowski, Bryant Jenkins, and T.W. Graphics, Defendants.

No. CIV. 02-74719.

June 12, 2003.

Taxpayer sued city, alleging that its personal income tax collection practices violated federal Privacy Act. On city's motion to dismiss, the District Court, Anna Diggs Taylor, J., held that: (1) taxpayer had no implied private right of action to enforce Privacy Act against city, and (2) attorney fees and costs were not recoverable.

Motion granted.

West Headnotes

[1] KeyCite Notes

✓ 13 Action

✓ 13l Grounds and Conditions Precedent

- 13k3 k. Statutory Rights of Action. Most Cited Cases

Whether statute is enforceable under implied right of action theory requires determination as to whether or not Congress intended to confer individual rights upon class of beneficiaries.

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[2] KeyCite Notes

13 Action

13I Grounds and Conditions Precedent

13k3 k. Statutory Rights of Action. Most Cited Cases

Legislative intent is determinative factor in discerning whether implied private right of action exists to enforce statute.

[3] KeyCite Notes

13 Action

13I Grounds and Conditions Precedent

13k13 k. Persons Entitled to Sue. Most Cited Cases

Private right of action for individuals to enforce Privacy Act's notice requirements is limited to actions against federal agencies. 5 U.S.C.A. § 552a(e), (g)(1)(D).

[4] KeyCite Notes

13 Action

13I Grounds and Conditions Precedent

13k3 k. Statutory Rights of Action. Most Cited Cases

Although Privacy Act affords private right of action to enforce its provisions, it does not provide private remedy against municipal corporation, or any other state actor for that matter. 5 U.S.C.A. § 552a.

[5] KeyCite Notes

326 Records

326II Public Access

326II(A) In General

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326k31 k. Regulations Limiting Access; Offenses.
Most Cited Cases

To prevail on Privacy Act notice claim, plaintiff must establish that: (1) agency failed to notify him of purpose for requesting information in question; (2) agency's actions had adverse effect on plaintiff; and (3) agency willfully or intentionally violated notice requirement. 5 U.S.C.A. 552a(e)(3).

[6] KeyCite Notes

326 Records

326II Public Access

326II(A) In General

326k34 k. Proceedings for Access. Most Cited Cases

Taxpayer, who had obtained declaratory relief in suit against city to enforce Privacy Act notice requirements, was not entitled to recover attorney fees and costs under class benefit theory; no class certification had been sought, taxpayer, having admitted lack of injury, was not appropriate class representative, and case did not fit into narrow class of shareholder lawsuits in which fees were recoverable despite lack of economic benefit.

Cyril V. Weiner, Elizabeth C. Thomson, Weiner & Cox, P.L.C., Southfield, MI, for plaintiff.

James D. Nosedo, City of Detroit Law Department, Detroit, MI, for defendant.

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MEMORANDUM OPINION AND ORDER

ANNA DIGGS TAYLOR, District Judge.

I.

Before the court is the City of Detroit's ("the City") Motion to Dismiss. Fed.R.Civ.P. 12(b)(6). Plaintiff alleges that the City's personal income tax collection practices violated § 7(b) of the Privacy Act of 1974 ("§ 7(b)"). 5 U.S.C. § 552a(e). At the first scheduled oral argument, Plaintiff stated that the City had raised new arguments in its Reply brief to which Plaintiff did not have an opportunity to respond on account of the court's briefing schedule. Plaintiff then requested leave to file a Supplemental Response brief. The court granted Plaintiff's request and also allowed the City to file a Supplemental Reply. On May 19, 2003, the court again heard oral argument on the City's motion. For the reasons explained below, the court GRANTS Defendant's Motion to Dismiss.

II.

The City imposes and collects income taxes from its residents as well as from non-residents who work in the City. The City requires taxpayers to provide their social security numbers on tax forms. In 2001, the City hired a contractor to print, address and otherwise prepare the 2001 City income tax forms for distribution to taxpayers who had filed a tax return the previous year. The contractor printed taxpayers' social security numbers on the mailing labels of certain tax forms. In January 2002, the City's Mayor, Kwame Kilpatrick, mailed a letter of apology to taxpayers for the mailing label mishap.

Plaintiff filed a five-count, class action complaint alleging that the City had violated § 7(b) of the Privacy Act. 5 U.S.C. § 552a(e). Plaintiff's complaint also included

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allegations of negligence, invasion of privacy and emotional distress. Three Defendants originally filed this Motion to Dismiss: the City, James Florkowski and Bryant Jenkins, the City's Manager and Principal Accountant, respectively. At the first oral argument, Plaintiff agreed to dismiss the federal claims against all of the individual defendants noting that the Privacy Act does not provide for suits against private persons. 5 U.S.C. § 552a(e). This court then dismissed the individual defendants with prejudice and declined to exercise pendent jurisdiction over Plaintiff's state law claims, none of which were against the City. The only pending claim before this court is Plaintiff's allegation that the City violated § 7(b). 5 U.S.C. § 552a(e).

Specifically, Plaintiff claims that the City violated § 7(b) by failing to include a disclosure statement outlining the purpose for requesting taxpayers' social security numbers and the intended uses for that information.^{FN1} 5 U.S.C. § 552a(e). The City contends that a 1976 amendment to the Social Security Act, 42 U.S.C. § 405(c)(2)(C)(i), partially repealed the Privacy Act of 1974, thereby allowing the City to require and use social security numbers in the administration of any tax law.^{FN2} The City further contends that federal tax law dictates that social security numbers be used as a taxpayer's identification number. *See*, 26 U.S.C. § 6109(d).^{FN3} At the first scheduled oral argument, the City, however, conceded that it intended to attach a disclosure statement to its tax forms in the future in order to comply with § 7(b). Plaintiff countered that he was seeking attorney fees and damages in addition to the prospective declaratory relief which the City had offered, hence the need for additional briefing and oral argument.^{FN4} This memorandum constitutes the court's findings of fact and law concerning the application of § 7(b) of the Privacy Act of 1974 to the City's administration of its tax laws.

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FN1. 5 U.S.C. § 552a(e)(3) states, in relevant part, that:

Each agency that maintains a system of records shall-

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual-

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information ...; and

(D) the effects on him, if any, of not providing all or any part of the requested information.

FN2. The Social Security Act states that:

It is the policy of the United States that any State (or political subdivision thereof) may, in the administration of any tax, ... within its jurisdiction, utilize the social security account numbers issued by the Commissioner of Social Security for the purpose of establishing the identification of individuals affected by such law, and may require any individual who is or appears to be so affected to furnish to such State (or political subdivision thereof) or any agency thereof having administrative responsibility for the law involved, the social security account number (or numbers, if he has more than one such number) issued to him by the Commissioner of Social Security. 42 U.S.C. § 405(c)(2)(C)(i).

FN3. 26 U.S.C. § 6109(d) states, in relevant part, that:

The social security account number issued to an individual ... shall, except as shall otherwise be specified under regulations of the Secretary, be used as the identifying number for such individual for purposes of this title.

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FN4. Plaintiff's counsel stated that several cases, particularly *Ohlsen v. DST Indus.*, 314 N.W.2d 699, 111 Mich.App. 580 (1981), supported his position. Plaintiff failed, however, to discuss that case in his Supplemental Brief filed with this court. Incidentally, because the *Ohlsen* court held that the plaintiff had no private right of action to enforce a private employer's violation of the state's occupational safety statute, the *Ohlsen* case does not support Plaintiff's argument.

III.

Plaintiff maintains that § 7(b) affords an implied private right of action. Plaintiff asserts that if he is not entitled to seek the remedies available under the statute, then the provisions of the Privacy Act that apply to local agencies provide empty rights with no means of enforcement. Conversely, the City has argued that Plaintiff has no claim, implied or otherwise, under the Privacy Act, save a possible action for declaratory relief only, on the limited issue of whether the City's tax form must include a § 7(b) disclosure statement. Plaintiff's claims against the City present two issues: 1) whether or not there is an implied cause of action that would allow Plaintiff to privately enforce § 7(b), and 2) if Plaintiff does have an implied cause of action, whether or not plaintiff is entitled to an award of damages and attorney fees in addition to the prospective declaratory relief to which the City has stipulated.

A. Implied Private Cause of Action

Plaintiff avers that whether an individual has an implied cause of action depends on the following four factors: 1) whether Plaintiff belongs to the class for whose benefit the statute was enacted; 2) whether the legislature intended, explicitly or implicitly, to create an implied cause of action; 3) whether an implied cause of action is consistent with the underlying purpose of the legislative scheme; and,

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4) whether the cause of action is one traditionally relegated to state law, such that it would be inappropriate to imply a cause of action based solely on federal law. *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). Defendant contends that courts must look to a statute's rights-creating language as well as look for a focus on individuals in a statute's text to determine whether Congress intended to create an implied private cause of action. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002).

1. Congressional Intent.

Whether a statute is enforceable under an implied right of action theory "require[s] a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries." *Gonzaga*, 536 U.S. at 285-86, 122 S.Ct. 2268, 153 L.Ed.2d 309. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 289, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). The Supreme Court's recent decisions are unequivocal. Legislative intent is the determinative factor "in discerning whether personal rights exist in the implied right of action context." *Gonzaga*, 536 U.S. at 285-86, 122 S.Ct. 2268, 153 L.Ed.2d 309; *see also*, *Sandoval*, 532 U.S. at 289, 121 S.Ct. 1511, 149 L.Ed.2d 517 (stating that Congress has the sole authority to create private causes of action); *Cline v. Rogers*, 87 F.3d 176, 182 (6th Cir.1996)(recognizing the Supreme Court's apparent modification of the *Cort* analysis).

Next, the court turns to an examination of congressional intent in drafting the Privacy Act's enforcement provisions. 5 U.S.C. § 552a(g). The Privacy Act states that

Whenever any agency fails to comply with any ... provision of this section, ... in such a way as to have an

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adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection. 5 U.S.C. § 552a(g)(1)(D).

Thus, the Privacy Act's language leaves no doubt as to the drafters' intent. Congress explicitly authorizes individual causes of action for failure to comply with § 7(b)'s notice requirements. 5 U.S.C. § 552a(e).

2. Available Remedies.

The inquiry, however, does not end with the determination that Congress intended to allow private causes of action to enforce the federal law in question. The Supreme Court has instructed that "[e]ven where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent to create not just a private right but also a private remedy." *Sandoval*, 532 U.S. at 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (citations omitted). Without a private remedy, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* Therefore, in order to determine if a private right of action can be implied in Plaintiff's favor, this court must also consider the remedies available under the statute. *Id.* The Privacy Act's civil remedies provision, as noted above, states that an individual may bring a civil action against an agency. 5 U.S.C. § 552a(g)(1). The term "agency," borrowed from the Freedom of Information Act, [I]ncludes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the

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President), or any independent regulatory agency. 5 U.S.C. § 552(f).

The term "agency" is further clarified to mean "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." 5 U.S.C. § 551(1).

Congress has meticulously outlined the definition of "agency" as indicated by its explicit exclusion of several possible entities from that term. 5 U.S.C. § 551(1) (listing eight entities excluded from the term "agency," among them are Congress, the federal courts and the government of the District of Columbia); 5 U.S.C. § 552(f). Congress' attention to detail in drafting several pieces of legislation delineating what an agency is and what it is not indicates that if Congress intended to authorize private causes of action against municipalities, then it would have done so explicitly. The private cause of action which the Privacy Act affords is, thus, limited to causes of action against federal agencies. *See, e.g., Unt v. Aerospace Corp.*, 765 F.2d 1440, 1447 (9th Cir.1985) (citations omitted)("The private right of civil action created by the [Privacy] Act is specifically limited to actions against agencies of the United States Government").

The City is not an agency under any statutory definition. 5 U.S.C. § 551(1); 5 U.S.C. § 552(f). Although the Privacy Act affords a private right of action to enforce its provisions, the statute does not provide a private remedy against a municipal corporation, or any other state actor for that matter. *Sandoval*, 532 U.S. at 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (citations omitted). The court rejects Plaintiff's argument that unless an implied private cause of action exists for § 7(b), then the statute designed to protect the privacy of taxpayers' social security numbers is an empty provision. Consistency with the statute is not the test for whether a private cause of action can be implied, but rather

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congressional intent is the relevant inquiry. *Id.* The court thus finds that the City is not properly subject to the requirements of § 7(b) of the Privacy Act and that it would be improper for this court to imply a private cause of action against the City. *Id.*; *Gonzaga*, 536 U.S. at 285-86, 122 S.Ct. 2268, 153 L.Ed.2d 309.

B. Damages

Plaintiff has also asserted that he is entitled to damages as specified in the Privacy Act which include a minimum award of \$1,000.00 for each violation of § 7(b), in addition to attorney fees and costs. 5 U.S.C. 552a(g)(4). ^{FN5} Alternatively, Plaintiff states that he is entitled to attorney fees and costs due to his successful procurement of declaratory relief on behalf of himself and other taxpayers who will benefit from the City's concession that it will add a disclosure statement to its future tax forms indicating the City's intended use of and purpose for requesting taxpayers' social security numbers. Although the court has already established that Plaintiff does not have an implied cause of action to enforce § 7(b), the court nevertheless addresses each of these arguments in turn in order to resolve Plaintiff's request for damages.

FN5. 5 U.S.C. 552a(g)(4) states, in relevant part, that:

(4) In any suit brought under the provisions of ... this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of-

(A) actual damages sustained by the individual as a result of the refusal or failure, but in case shall a party entitled to recovery receive less than the sum of \$1,000; and

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(B) the costs of the action together with reasonable attorney fees as determined by the court.

1. Damages Pursuant to the Privacy Act

In order to prevail on a claim arising under the Privacy Act, Plaintiff must establish that 1) the City failed to notify him of the purpose for requesting his social security number; 2) the City's actions had an adverse effect on Plaintiff; and, 3) the City willfully or intentionally violated § 7(b). 5 U.S.C. 552a(e)(3); *see also*, *Cardamone v. Cohen*, 241 F.3d 520, 525 (6th Cir.2001). It is undisputed that the City did not inform Plaintiff or any other taxpayer of the purpose for requesting social security numbers on tax forms. It is implausible that the City's actions adversely affected Plaintiff because he has admitted that the City did not harm him by requesting his social security number.^{FN6} Further, the City has argued that its request for taxpayers' social security numbers is effectively mandated by the Internal Revenue Service's ("IRS") use of those numbers for taxpayer identification purposes, as well as on federal tax forms such as the W-2. 26 U.S.C. § 6109(d). Inasmuch as the City requests taxpayers social security numbers' for taxpayer identification purposes, and that such is the practice of the IRS and most local and state tax authorities, Plaintiff has also failed to show that the City acted intentionally or willfully. Therefore, even if he had an implied cause of action, Plaintiff has met neither the statutory criteria nor the Sixth Circuit test for entitlement to damages pursuant to the Privacy Act. 5 U.S.C. § 552a(e)(3); *Cardamone*, 241 F.3d at 525.

FN6. "Plaintiff ... does not claim to have been denied of any right or privilege." Pl.'s Response Br. to Def.'s Mot. to Dismiss. p. 6.

2. Class Benefit Theory

Plaintiff relies on *Mills v. Electric Auto-Lite*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970), for the proposition

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that he is entitled to attorney fees for securing prospective declaratory relief on behalf of others. This court finds that *Mills* is inapplicable authority for two reasons. 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593. First, the Plaintiff has neither moved for, nor has the court granted, certification of the class for whose benefit Plaintiff seeks relief for having to disclose their social security numbers. Having admitted that he suffered no harm as a result of the City's failure to provide a disclosure statement in accordance with § 7(b), Plaintiff would not be an appropriate class representative. *Courtney v. Smith*, 297 F.3d 455, 467 (6th Cir.2002) (citations omitted)(noting that as a prerequisite to class certification it must be established that the class representative has standing to pursue the claims as to which class-wide relief is sought). Even if an implied private right of action to enforce § 7(b) existed, which it does not, Plaintiff has no standing to pursue relief on behalf of the class. *Id.* Therefore, he should not be allowed to secure attorney fees for obtaining prospective declaratory relief on behalf of a class which he cannot appropriately represent. *Id.*

Second, the Court in *Mills* created a very narrow exception to the general rule that attorney fees cannot be awarded for seeking relief on behalf of a class absent securing a substantial economic benefit for that class. *Mills*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593. The Court found in that case that the absence of statutory authority did not preclude granting attorney fees in successful shareholder lawsuits wherein the plaintiffs obtained declaratory relief, because such lawsuits theoretically benefit the entire corporation. *Id.* Plaintiff is not seeking relief on behalf of shareholders or even on behalf of a certified class, nor has Plaintiff obtained relief from the court. Therefore, Plaintiff's request for attorney fees must be denied because it does not fit the very limited class benefit exception articulated in *Mills*. *Id.*

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The court thus finds that 1) Plaintiff has no implied cause of action to enforce § 7(b), and 2) Plaintiff is not entitled to damages under the Privacy Act or pursuant to a class benefit theory because Plaintiff has no standing to sue and, therefore, is not an appropriate class representative. 5 U.S.C. § 552a(g).

IV.

The court having heard oral argument on May 19, 2003, and being otherwise fully advised on the premises; Now therefore,

IT IS ORDERED that Plaintiff is limited to the prospective declaratory relief outlined in the Order which was presented by the Defendant City and is attached to this Memorandum Opinion.

IT IS SO ORDERED.

ORDER GRANTING DECLARATORY RELIEF DISMISSING REMAINING FEDERAL LAW CLAIMS, AND DISMISSING STATE LAW CLAIMS WITHOUT PREJUDICE

This matter comes before the Court on motion under F.R. Civ. P. 12(b)(6) by defendants City of Detroit, James Florkowski and Bryant Jenkins for dismissal of the plaintiff's federal law claims under Section 7(b) of the Privacy Act of 1974. Plaintiff's counsel has agreed to dismiss the federal claim against all defendants other than the City of Detroit. The Court finds that there is no express nor implied cause of action for damages or other relief under the Privacy Act against a state actor other than for prospective declaratory relief. The City of Detroit has agreed to include a Privacy Act notice on City income tax forms. All federal law claims in this action having been resolved before discovery, it serves the interest of judicial economy, convenience, fairness and

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comity to decline to exercise supplemental jurisdiction over plaintiff's state law tort claims.

Now, therefore, it is ordered:

1. The Court declares, under section 7(b) of the Privacy Act of 1974, that on and after the date of this order, the following statement or its reasonable equivalent be included with City of Detroit income tax return forms which request a social security account number:

The disclosure of social security account number(s) on this tax return is mandatory. This solicitation and use of social security account numbers is authorized by federal law (42 USC § 405(c)(2)(C)(i)), Michigan law (MCL 141.642), and city of Detroit ordinance (1984 Detroit City Code § 18-10-11). The City of Detroit uses social security account numbers in the administration of its income tax law for the purpose of establishing taxpayer identification, to automate and unify its tax reporting and collection, and as otherwise needed for the administration of the City's income tax laws. Under 1984 Detroit City Code § 18-10-16, any information gained by the income tax administrator, city treasurer or other city official, agent or employee as a result of a tax return, investigation, hearing or verification required or authorized by the Uniform Income Tax Ordinance is confidential, except for official purposes in connection with the administration of the ordinance, and except in accordance with a proper judicial order.

2. Except for the above prospective declaratory relief, plaintiff fails to state a claim under federal law upon which relief can be granted and its federal law claim is dismissed.

3. Under 28 U.S.C. § 1367(c)(3), the Court declines to exercise

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supplemental jurisdiction over plaintiff's state law claims and those claims are dismissed without prejudice.

4. There are no other pending claims and this order closes the case.

E.D.Mich.,2003.

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©Thompson/West. No claim to original U.S. Govt. works.

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TEXT OF STATUTORY PROVISIONS INVOLVED PER SUPREME COURT RULE 14.1(f)

This case involves the construction and application of §7(b) of the Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896, 1909, 5 U.S.C. §552a (2004)(note), in connection with the definition of "agency" in 5 U.S.C. §552(f), as well as 42 U.S.C. §§1983 and 1988. The text of these statutes is as follows:

Section 7(b) of the Privacy Act, Pub.L. 93-579, 88 Stat.1909, 5 U.S.C. § 552a (2004) (note)¹, provides as follows:

Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

5 U.S.C. § 552a(a)(1), which is part of the Privacy Act, provides:

a) Definitions.--For purposes of this section--

(1) the term "agency" means agency as defined in section 552(e) of this title;

5 U.S.C. § 552(f) provides:

(f) For purposes of this section, the term--

¹ Section 7(b) is not part of the United States Code but it is part of the Statutes at Large, 88 Stat. 1909, and therefore fully effective per 1 U.S.C. §112 (declaring that the Statutes at Large "shall be legal evidence of laws." The fact that §7(b) is not codified with other parts of the Privacy Act, e.g., 5 U.S.C. §552a, is of crucial importance here, because the limiting definition of "agency" in 5 U.S.C. §552(f) applies only to §552a and not to §7(b).

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(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency;

28 U.S.C. §1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 U.S.C. §1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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42 U.S.C. §1988 provides:

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United

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States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

APPENDIX E

**United States Court of Appeals,
Eleventh Circuit.**

**Deborah SCHWIER, Theodore Schwier, et al., Plaintiffs-
Appellants,**

v.

**Cathy COX, in her official capacity as Secretary of State of
Georgia,**

Defendant-Appellee,

United States of America, Intervenor.

No. 02-13214.

Aug. 11, 2003.

340 F.3d 1284 (11th Cir., 2003)

Unsuccessful voter registrants filed suit against Secretary of the State of Georgia, seeking declaratory and injunctive relief under § 1983 based on claims that Georgia's voter registration procedure and voter registration form violated Privacy Act and Voting Rights Act. The United States District Court for the Northern District of Georgia, No. 00-02820-CV-JEC-1, Julie E. Carnes, J., found that plaintiffs could not bring a private right of action under § 1983, and they appealed. The Court of Appeals, Dubina, Circuit Judge, held that: (1) rights conferred by section of Privacy Act barring agencies from denying any right because of individual's refusal to disclose his social security account number could be enforced by a private right of action under § 1983, and (2) Voting Rights Act provision forbidding the practice of disqualifying potential voters for their failure to provide information irrelevant to determining their eligibility to vote could be enforced by a private right of action under § 1983.

Reversed and remanded.

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Voting Rights Act provision forbidding the practice of disqualifying potential voters for their failure to provide information irrelevant to determining their eligibility to vote could be enforced by a private right of action under § 1983; neither Voting Rights Act's provision for enforcement by the Attorney General nor Congress's failure to provide for a private right of action expressly in Voting Rights Act required the conclusion that Congress did not intend such a right to exist. 42 U.S.C.A. § 1971(a)(2)(B); 42 U.S.C.A. § 1983.

Neil Bradley, ACLU, Atlanta, GA, for Plaintiffs-Appellants.
Kendall L. Kerew, Kathryn L. Allen, Georgia Dept. of Law,
Atlanta, GA, for Defendant-Appellee.
Michael S. Raab, Catherine Y. Hancock, U.S. Dept. of Justice,
Civ. Div., Appellate Staff, Washington, DC, for Intervenor.

Appeal from the United States District Court for the
Northern District of Georgia.

Before DUBINA and BLACK, Circuit Judges, and RYSKAMP
[FN*], District Judge.

FN* Honorable Kenneth L. Ryskamp, United
States District Judge for the Southern District
of Florida, sitting by designation.

DUBINA, Circuit Judge:

Deborah Schwier, Theodore Schwier, and Michael Craig (collectively, "Appellants") filed suit in federal district court against Cathy Cox ("Cox"), in her official capacity as Secretary of the State of Georgia, seeking declaratory and injunctive relief under 42 U.S.C. § 1983. The Appellants claimed that Georgia's voter *1286 registration procedure and Voter Registration Form violated section 7 of the Privacy Act of 1974, Pub.L. 93- 579, 88 Stat. 1896, 2194, 5 U.S.C. 552a (note), and section 1971 of the Voting Rights Act of 1870, 42 U.S.C. § 1971(a)(2)(B). The district court found that

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Appellants could not bring a private right of action under § 1983 for violations of section 7 of the Privacy Act or section 1971 of the Voting Rights Act. For the reasons that follow, we reverse.

I. BACKGROUND

Prior to the general election of November, 2000, Deborah and Theodore Schwier ("the Schwiers") attempted to register to vote in Walton County, Georgia. The Schwiers submitted their registration applications without supplying their social security numbers ("SSNs"). Subsequently, Walton County officials notified the Schwiers that, unless they supplied officials with their SSNs, their voter registrations would be rejected. Michael Craig ("Craig") was unable to vote in Gwinnett County, Georgia because he also refused to supply officials with his SSN. The Schwiers [FN1] sought and won a preliminary injunction allowing them to vote in the election without providing their SSNs in the customary manner. [FN2] Discovery focused primarily on how Georgia implemented its voter registration statute, O.C.G.A. § 21-2-219.

FN1. Craig joined the suit later.

FN2. The injunction required the Schwiers to file their SSNs under seal with the court and also with election officials, who would hold the numbers without entering them into the system. If the Schwiers prevailed on the merits, the election officials would be required to destroy their record of the Schwiers' SSNs, but if Cox prevailed, the election officials would be allowed to enter the Schwiers' SSNs into the system.

After discovery, Appellants and Cox filed cross motions for summary judgment. The district court granted

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Cox's motion for summary judgment on both the Privacy Act and Voting Rights Act claims. Appellants then perfected this appeal.

Appellants claim that Georgia's requirement that they provide their SSNs in order to vote and Georgia's Voter Registration Form ("the Form") violate the Privacy Act. Appellants argue that section 7 of the Privacy Act contains no remedial scheme and that Appellants may sue Cox for violations of section 7 via § 1983.

Cox argues that the Appellants do not have a private right of action under the Privacy Act. Alternatively, Cox argues that Georgia's voting statute is protected from the prohibitions of the Privacy Act by the Act's "grandfather" provision. Cox further argues that if Appellants may sue state officials for violations of the Privacy Act via § 1983, then passage of the Privacy Act exceeded Congress's authority, and the Privacy Act is unconstitutional. Because Cox argues that if section 7 of the Privacy Act is enforceable via a private right of action brought under § 1983, then section 7 of the Privacy Act is unconstitutional, the United States ("the Government") intervened as a matter of right pursuant to 28 U.S.C. § 2403(a) and Rule 44 of the Federal Rules of Appellate Procedure. The Government argues that the Privacy Act may be enforced under § 1983 and that Congress did not exceed its authority in passing the Privacy Act.

Appellants also contend that Georgia's requirement that voters supply their SSNs in order to vote violates 42 U.S.C. § 1971(a)(2)(B) of the Voting Rights Act, which prohibits states from disqualifying potential voters based on their failure to provide information not relevant to determining their eligibility to vote. Appellants argue that since its enactment in 1871, § 1983 has been available to private citizens to enforce the Voting Rights Act. They

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contend that when Congress gave the Attorney General the authority to enforce the Voting Rights Act through the enactment of the Civil Rights Act of 1957, Congress *added* a means of enforcing the Voting Rights Act but did not take away the previously existing remedy of private suits via § 1983.

Cox argues that section 1971 of the Voting Rights Act may be enforced only by the Attorney General. In the alternative, Cox argues that, even if § 1971 may be enforced by a private right of action under § 1983, Appellants' claim is moot because Georgia has modified its Voter Registration Form.

II. ISSUES

1. Whether the district court erred in holding that section 7 of the Privacy Act does not allow for enforcement by a private right of action against state agencies by a suit under § 1983.
2. If the Privacy Act allows for a private right of action, whether Congress exceeded its authority in enacting the Privacy Act, rendering the Privacy Act unconstitutional.
3. Whether Georgia qualifies for the "grandfather" exception of section 7(a)(2)(B) of the Privacy Act.
4. Whether Georgia's Voter Registration Form complies with the notice requirements of section 7(b) of the Privacy Act.
5. Whether the district court erred in holding that section 1971 of the Voting Rights Act may not be enforced by a private right of action under § 1983.
6. Whether the disclosure of a person's SSN is "material" in determining whether he or she is qualified to vote under Georgia law for purposes of section 1971 of the Voting Rights Act.

III. STANDARD OF REVIEW

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This court reviews "the district court's grant of summary judgment *de novo*.

Summary judgment is appropriate where there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." *Hale v. Tallapoosa County*, 50 F.3d 1579, 1581 (11th Cir.1995) (internal quotations and citation omitted).

IV. DISCUSSION

A. *Whether the district court erred in holding that section 7 of the Privacy Act does not allow for enforcement by a private right of action against state agencies by a suit under § 1983.*

The Privacy Act of 1974 contains only two substantive sections, section 3 and section 7. See 88 Stat. at 2177-94. Section 3 of the Privacy Act *applies only to federal agencies* and, among other things, delineates an individual's right to records of federal agencies and right to be protected from disclosure of records by federal agencies. Section 3 contains a comprehensive remedial scheme which includes the right to bring a civil action against a federal agency; however, the remedial scheme of section 3 states that it *applies only to section 3*.

Section 7 of the Privacy Act bars federal, *state*, or local agencies from denying "any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number" to the agency. [FN3] Section 7 of the Privacy Act does not contain its own remedial scheme and is explicitly excluded from the remedial scheme of section 3; thus, section 7 has *no* remedial scheme.

FN3. The entire text of section 7 of the Privacy Act states:

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(a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) The provisions of paragraph (1) of this subsection shall not apply with respect to--

(A) any disclosure which is required by Federal statute, or

(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

88 Stat. at 2194.

1. *The district court's finding that section 7 of the Privacy Act is a "dead letter."*

Within the Privacy Act itself, Congress stated that section 3 was an amendment to Title V, which governs federal administrative agencies. See 88 Stat. at 2178. Thus, section 3 added a new section to Title V and was codified as

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5 U.S.C. § 552a. *Id.* at 2177. Because Congress made no such statement about section 7 of the Privacy Act, the revisor of the U.S.Code placed section 7 in an "Historical and Statutory" note following 5 U.S.C. § 552a. *See* 5 U.S.C. § 552a (note). The district court mistakenly placed great weight on this fact. The district court noted that, although section 7 was part of the Privacy Act that "was passed into law as Public Law 93-579," the fact that section 7 "was never codified, and appears only in the 'Historical and Statutory Notes' section of the United States Code," made section 7 a mere "historical footnote to the Privacy Act of 1974 [which] Congress has never reflected any intention of [codifying]." The district court apparently believed that public laws have less "weight" as laws than laws which have been codified. The reverse is true: "the Code cannot prevail over the Statutes at Large when the two are inconsistent." *United States v. Welden*, 377 U.S. 95, 98 n. 4, 84 S.Ct. 1082, 1085 n. 4, 12 L.Ed.2d 152 (1964) (internal quotations omitted).

The district court also stated that section 7 was deleted from the Privacy Act by the Senate Government Operations Committee "before the law was codified into the official code." The district court quotes Senate Report 1183, but the quote demonstrates that the provision that was deleted from the Act pertained only to a business entity's refusal to enter into a "business transaction or commercial relationship with an individual because of [his] refusal to disclose or furnish [his social security] number." S. Rep. No. 93-1183 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6943. Thus, the court's conclusion that section 7 of the Privacy Act had been deleted was error. The best proof of this is section 7's presence in the Statutes at Large. *See* 88 Stat. at 2194; *see also Welden*, 377 U.S. at 98 n. 4, 84 S.Ct. at 1085 n. 4. We therefore conclude that the district court erred in finding that section 7 of the Privacy Act was "a dead letter."

2. *The district court's finding that the remedial scheme of section 3 forecloses a private action for violations of section 7.*

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In finding that section 7 does not provide for a private right of action, the district court relied on the Ninth Circuit's holding in *Dittman v. California*, 191 F.3d 1020 (9th Cir.1999), that "[t]he civil remedy provisions of the statute do not apply against private individuals, state agencies, private entities, or state and local officials." 191 F.3d at 1026 (quoting *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1447 (9th Cir.1985) (first emphasis added)).

In *Dittman*, the Ninth Circuit relied on two cases which involved only section 3 of the Privacy Act. Thus, when the Ninth Circuit quoted *Unt v. Aerospace Corp.* above, the phrase, "the statute," referred to section 3 of the Privacy Act, not section 7. *Unt*'s holding had no relevance to the facts of *Dittman* or to the present case because in *Unt*, the plaintiff was trying to sue a non-government entity for violations of section 3 of the Privacy Act, which pertains only to federal agencies. *Unt*, 765 F.2d at 1447.

In addition, *Dittman* relied on the Seventh Circuit's holding in *Polchowski v. Gorris*, 714 F.2d 749 (7th Cir.1983). *Polchowski* also had no relevance to the facts of *Dittman* because, again, *Polchowski* involved enforcement of section 3 of the Privacy Act, rather than section 7. In *Polchowski*, the plaintiff sought to sue a state agency under § 1983 for releasing criminal information about him. 714 F.2d at 750. The release of the information would have violated section 3 of the Privacy Act, but section 3 applies only to federal agencies. Thus, the court reasoned, "Congress, by limiting the scope [of section 3 to federal agencies] has provided unequivocal and persuasive evidence that it intended to foreclose private enforcement of [section 3] against state or local officials who make unwarranted disclosures of statistical information." *Id.* at 752 (internal quotations omitted). In other words, the rights created by section 3 of the Privacy Act do not restrict the activities of state agencies.

In *St. Michael's Convalescent Hospital v. California*, 643 F.2d 1369, 1373 (9th Cir.1981), on which *Dittman* also relied, the plaintiffs sought to sue a state agency under section 3 of

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the Privacy Act. As in *Polchowski*, the plaintiffs sought to sue a state agency for violating a section of the Privacy Act which applies only to federal agencies. Thus, the Ninth Circuit dismissed plaintiffs' claims. *St. Michael's*, 643 F.2d at 1372.

In summary, *Unt*, *Polchowski*, and *St. Michael's*, all relied upon by the Ninth Circuit in *Dittman*, were distinguishable from *Dittman* and did not support the Ninth Circuit's holding in that case. *Dittman* failed to recognize that the remedial scheme of section 3 applies only to section 3 and has no bearing on section 7. Thus, the remedial scheme of section 3 provides no basis for concluding that Congress intended to preclude private remedies under § 1983 for violations of section 7. Therefore, we conclude that the district court erred in finding that the remedial scheme of section 3 of the Privacy Act precluded a private right of action via § 1983 for violations of section 7 of the Privacy Act.

3. *The district court's finding that the Tax Reform Act of 1976 limited the scope of the Privacy Act.*

The district court also found that the Tax Reform Act of 1976, which amended the Social Security Act, authorized the states to use SSNs for voting. The court's finding was due in large part to its reliance on *Stoianoff v. Commissioner of Motor Vehicles*, 107 F.Supp.2d 439, 442 (S.D.N.Y.2000), *aff'd*, 12 Fed.Appx. 33 (2nd Cir.2001). However, *Stoianoff* and the district court mistakenly relied on Committee language which was much broader than the very narrow language of the final version of the Tax Reform Act passed into law. See *Stoianoff*, 107 F.Supp.2d at 442. The final version authorizes States to use SSNs only "in the administration of any tax, general public assistance, driver's license, or motor vehicle registration." 42 U.S.C. § 405(c)(2)(C)(i) (2003). Thus, the district court erred in concluding that the scope of the Privacy Act had been limited by the Tax Reform Act.

4. *The Privacy Act and §1983.*

In *Gonzaga University v. Doe*, 536 U.S. 273, 283-84, 122 S.Ct. 2268, 2276, 153 L.Ed.2d 309 (2002), the Supreme Court

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noted that the inquiry into whether a statute contains an implied right of action and the inquiry into whether the statute creates rights enforceable under § 1983 “overlap” in that both inquiries must begin with the question of whether “Congress intended to create a federal right.” 536 U.S. at 283, 122 S.Ct. at 2275. Here, we ask only whether the Privacy Act creates rights enforceable under § 1983 because this is the issue Appellants raise on appeal.

Section 1983 provides a private right of action whenever an individual has been deprived of any constitutional or statutory federal right under color of state law. See 42 U.S.C. § 1983; see also *Maine v. Thiboutot*, 448 U.S. 1, 4, 100 S.Ct. 2502, 2504, 65 L.Ed.2d 555 (1980). In *Blessing v. Freestone*, 520 U.S. 329, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997), the Supreme Court noted that they had “traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right”:

First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

520 U.S. at 340-41, 117 S.Ct. at 1359 (internal citations and quotations omitted). [FN4] However, in *Gonzaga*, the Court pointed out that some courts had misunderstood the first factor of *Blessing* to permit a conferred “benefit” rather than “anything short of an unambiguously conferred right to support a cause of action brought under § 1983[,] ... [which] provides a remedy only for the deprivation of ‘rights, privileges, or immunities secured by the Constitution and laws’ of the United States.” 536 U.S. at 282-83, 122 S.Ct. at 2275 (emphasis added).

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FN4. In *Blessing*, the Supreme Court found that Title IV-D could not be enforced by individuals under § 1983. The Court noted that Title IV-D's "requirement that a State operate its child support program in 'substantial compliance' with Title IV-D" was a "yardstick for the Secretary to measure the systemwide performance of a State's Title IV-D program" and thus did not confer a right or "individual entitlement to services" on "individual children and custodial parents." 520 U.S. at 343, 117 S.Ct. at 1361.

Thus, before we analyze the application of the *Blessing* factors to the Privacy Act, in keeping with *Gonzaga*, we must first ask whether Congress created an "unambiguously conferred right" in section 7 of the Privacy Act. 536 U.S. at 283, 122 S.Ct. at 2275; *see also Blessing*, 520 U.S. at 340, 117 S.Ct. at 1359 ("In order to seek redress through § 1983, ... a plaintiff must assert the violation of a federal right, not merely a violation of federal law."). The relevant portion of section 7 states, "It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." 88 Stat. at 2194. We agree with the Government that this language, aimed at the denial of rights to individuals, is analogous to language cited by the Supreme Court in *Gonzaga* as "explicit 'right-or duty-creating language'".

Title VI provides:

"No person in the United States shall ... be subjected to discrimination under any program or activity receiving Federal financial assistance" on the basis of race,

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color, or national origin. 78 Stat. 252, 42 U.S.C. § 2000d (1994 ed.) (emphasis added).

Title IX provides:

"No person in the United States shall, on the basis of sex ... be subjected to discrimination under any education program or activity receiving Federal financial assistance."

86 Stat. 373, 20 U.S.C. § 1681(a) (emphasis added). Where a statute does not include this sort of explicit "right- or duty-creating language" we rarely impute to Congress an intent to create a private right of action. 536 U.S. at 284 n. 3, 122 S.Ct. at 2276 n. 3. In contrast, the relevant language of the Family Educational Rights and Privacy Act of 1974 ("FERPA"), which the *Gonzaga* Court held not to create personal rights enforceable under § 1983 provides:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents to any individual, agency, or organization.

536 U.S. at 278-79, 122 S.Ct. at 2273 (quoting 20 U.S.C. § 1232g(b)(1)). The Court explained:

Unlike the individually focused terminology of Titles VI and IX ("no person shall be subjected to discrimination"), FERPA's provisions speak only to the Secretary of Education, directing that "[n]o funds shall be made available" to any "educational agency or institution" which has a prohibited "policy

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or practice.” 20 U.S.C. § 1232g(b)(1). This focus is two steps removed from the interests of individual students and parents and clearly does not confer the sort of “individual entitlement” that is enforceable under § 1983.

Id., 536 U.S. at 287, 122 S.Ct. at 2277 (quoting *Blessing*, 520 U.S. at 343, 117 S.Ct. at 1353).

Admittedly, the language of section 7 falls somewhere in between the language of Titles VI and IX and that of FERPA. The subject of the relevant clauses of Titles VI and IX is “person,” whereas the subject of the relevant clause of the Privacy Act is “it.” In other words, if the Privacy Act were worded, “No individual may be denied any right, benefit, or privilege provided by law by any Federal, State or local government agency because of such individual’s refusal to disclose his social security account number,” the language would be more precisely analogous to that of Titles VI and IX. Nonetheless, the Privacy Act clearly confers a *legal right* on *individuals*: the right to refuse to disclose his or her SSN without suffering the loss “of any right, benefit, or privilege provided by law.” 88 Stat. at 2194. Thus, we conclude that Congress created an “unambiguously conferred right” in section 7 of the Privacy Act. *Gonzaga*, 536 U.S. at 283, 122 S.Ct. at 2275. [FN5]

FN5. In addition, unlike the Privacy Act, the *Gonzaga* court held that FERPA is essentially “spending legislation,” which rarely “confer[s] enforceable rights.” *Gonzaga*, 536 U.S. at 279, 122 S.Ct. at 2273.

As for the factors of *Blessing*, the language of section

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7 is clearly intended to benefit individuals, as discussed above; is specific rather than amorphous; and is clearly mandatory. To read the statute is to see that it easily meets the three criteria of *Blessing*. First, because we have already concluded that Congress created an "unambiguously conferred right" in section 7 of the Privacy Act, we necessarily conclude that the language is intended to benefit individuals. Secondly, the prohibitions of the statute are clear and specific: no "Federal, State or local government agency [may] deny ... any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." 88 Stat. at 2194. Finally, the language, "It shall be unlawful" is mandatory rather than precatory. These words indicate a clear prohibition of specific behavior by Federal, State or local government rather than an "aspirational" goal or "yardstick." See *Blessing*, 520 U.S. at 343, 117 S.Ct. at 1361.

However, "[e]ven if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983." *Blessing*, 520 U.S. at 341, 117 S.Ct. at 1360. To establish that the presumption cannot be rebutted, courts must look to whether Congress intended to "foreclose[] a remedy under § 1983" either "expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* As the text demonstrates, Congress did not explicitly foreclose an action under § 1983. Thus, the relevant question is whether Congress did so "impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement." *Id.* Again, to read the statute is to answer the question. Section 7 contains no enforcement scheme at all. And, as we have explained above, although section 3 of the Privacy Act contains a comprehensive remedial scheme, section 3 specifically states that its

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remedial scheme applies *only* to section 3. Thus, the presumption that the rights conferred by section 7 of the Privacy Act may be vindicated via a suit under § 1983 stands, and we hold that the rights conferred by section 7 may be enforced under § 1983.

B. If the Privacy Act allows for a private right of action, whether Congress exceeded its authority in enacting the Privacy Act, rendering the Privacy Act unconstitutional.

Cox argues that if Appellants may sue a State for violation of the Privacy Act via § 1983, then Congress exceeded its authority in passing the Privacy Act. Cox argues that the only possible source of authority for the Privacy Act was Congress's Commerce Clause power. The Government argues, however, that Congress's right to establish the use of SSNs arises from the "general welfare clause," which authorizes Congress to spend money for the general welfare. This power is "quite expansive." *Buckley v. Valeo*, 424 U.S. 1, 90, 96 S.Ct. 612, 668, 46 L.Ed.2d 659 (1976). In addition, the Government argues, the Necessary and Proper Clause "authorizes Congress ... to adopt measures that bear a rational connection to any of its enumerated powers." *United States v. Edgar*, 304 F.3d 1320, 1326 (11th Cir.), *cert. denied*, 537 U.S. 1078, 123 S.Ct. 679, 154 L.Ed.2d 577 (2002). Thus, the Government argues, because Congress had the authority to authorize the creation of SSNs, Congress has the authority to "safeguard[] the proper use of social security numbers by prohibiting federal, state, and local governments from conditioning an individual's legal rights on disclosure of his social security number." We agree with the Government and hold that Congress did not exceed its authority in passing the Privacy Act.

C. Whether Georgia qualifies for the "grandfather" exception of section 7(a)(2)(B) of the Privacy Act.

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Section 7(a)(2) of the Privacy Act makes an exception for agencies which "maintain[ed] a system of records in existence and operating before January 1, 1975," but only "if such disclosure was required under statute or regulation adopted [before January 1, 1975] to verify the identity of an individual." 88 Stat. at 2194. Thus, to qualify for the grandfather exception, Georgia must show that it meets two criteria: (1) that it maintained a system of records operating before January 1, 1975; and (2) that the system required the disclosure of an individual's SSN to verify the identity of that individual. [FN6]

FN6. Cox states that "[t]he registration card set forth in Section 34-609 [now O.C.G.A. § 21-2-219] contained a blank for the individual's social security number '(If known at the time of application)' " and that the Form was not changed to delete the phrase "if known at the time of the application," until 1995. Thus, before 1975, the SSN was not required; it was only required "if known at the time of the application." Cox's acknowledgment may warrant summary judgment for Appellants because it would indicate that Georgia cannot meet the second requirement. Nonetheless, we remand this issue to the district court because further fact-finding may be necessary and in deference to "the general rule ... that a federal appellate court does not consider an issue not passed upon below." *Iraola & CIA, SA v. Kimberly-Clark Corp.*, 325 F.3d 1274, 1284-85 (11th Cir.2003) (internal quotation omitted).

Because we hold that the rights conferred by the Privacy Act may be vindicated via a private right of action under § 1983, we remand the issue of whether Georgia

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qualifies for the "grandfather" exception of the Privacy Act to the district court to address in the first instance.

D. Whether Georgia's voter registration forms comply with the notice requirements of section 7(b) of the Privacy Act.

Appellants argue that Georgia's Voter Registration Form fails to comply with the notification requirements of section 7(b) of the Privacy Act because the Form does not inform voters under what authority the demand for their SSNs is made. Secondly, Appellants argue that the Form promises confidentiality and "internal" use only. Cox admits that state law allows the SSNs to be disclosed to other Georgia state agencies if requested by those agencies.

However, Cox notes that the Form has been modified to contain citations to O.C.G.A. §§ 21-2-219 and 21-2-220 as statutory authority for requiring the SSNs. Cox also states that the other modification to the card is that it will now explain that "internal use only" "means to identify and verify the identity of voters." If it is true that other state agencies in Georgia will have access to Georgia voters' SSNs, this modification would seem insufficient to bring the Form into compliance with section 7(b) of the Privacy Act. The district court did not reach this issue because it found that the Privacy Act could not be enforced by a private right of action. Thus, we remand this issue to the district court to consider in the first instance.

E. Whether the district court erred in holding that section 1971 of the Voting Rights Act may not be enforced by a private right of action under § 1983.

Appellants also contend that Georgia's requirement that voters supply their SSNs in order to vote violates 42 U.S.C. § 1971(a)(2)(B) of the Voting Rights Act, which forbids the practice of disqualifying potential voters for their failure

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to provide information irrelevant to determining their eligibility to vote. This provision was intended to address the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters. See *Condon v. Reno*, 913 F.Supp. 946, 949-50 (D.S.C.1995). For example, one "such tactic[] [was to] disqualify[] an applicant who failed to list the exact number of months and days in his age." *Id.* Section 1971(c), the provision authorizing the Attorney General to sue to enforce § 1971, was added to the statute by the Civil Rights Act of 1957. The district court found that Congress intended § 1971(c) to foreclose the possibility of a private right of action under § 1983. The district court relied on the Sixth Circuit's holding in *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir.2000), that § 1971 is only enforceable by the Attorney General.

In *McKay*, the Sixth Circuit relied entirely on *Willing v. Lake Orion Community Schools Board of Trustees*, 924 F.Supp. 815, 820 (E.D.Mich.1996), which in turn relied entirely on *Good v. Roy*, 459 F.Supp. 403, 405-06 (D.Kan.1978). Thus, the extent of the analysis relied on by the Sixth Circuit is the following from *Good*: "Furthermore, subsection (c) provides for enforcement of the statute by the Attorney General with no mention of enforcement by private persons.... [T]he unambiguous language of Section 1971 will not permit us to imply a private right of action." 459 F.Supp. at 405-406.

However, in *Allen v. State Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969), and *Morse v. Republican Party of Virginia*, 517 U.S. 186, 116 S.Ct. 1186, 134 L.Ed.2d 347 (1996) (plurality opinion), the Supreme Court found that other sections of the Voting Rights Act, 42 U.S.C. §§ 1973c and 1973h, respectively, could be enforced by a private right

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of action, even though those sections also provide for enforcement by the Attorney General.

In *Allen*, which dealt with the provision of the Voting Rights Act requiring judicial scrutiny of alterations of voting qualifications or procedures, the Court reasoned that the goals of the statute were much more likely to be reached if private citizens "1295 were not "required to depend solely on litigation instituted at the discretion of the Attorney General." 393 U.S. at 556, 89 S.Ct. at 827. Thus, the *Allen* Court found that the possibility of enforcement by the Attorney General did not preclude enforcement by private citizens, 393 U.S. at 556-57, 89 S.Ct. at 827, which is contrary to the conclusion reached by *Good* and relied on by the Sixth Circuit. See also *Sierra Club v. Andrus*, 610 F.2d 581, 589 n. 12 (9th Cir.1979) (following *Allen*, the court noted that a provision in the Rivers and Harbors Act of 1899 expressly providing for enforcement by the Attorney General "[did] not necessarily preclude a private right of action"), *rev'd sub nom.* on other grounds, *California v. Sierra Club*, 451 U.S. 287, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981). [FN7]

FN7. The Supreme Court held that the language of the Rivers and Harbors Act did not show congressional intent to "confer federal rights upon [a particular class of] beneficiaries," but was instead merely "a general proscription of certain activities." *California v. Sierra Club*, 451 U.S. at 294, 101 S.Ct. at 1779.

Furthermore, the provision giving the Attorney General the right to bring a civil suit under § 1971 was not added to § 1971 until 1957. Therefore, from the enactment of § 1983 in 1871 until 1957, plaintiffs could and did enforce the provisions of § 1971 under § 1983. See, e.g., *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944); *Chapman v.*

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King, 154 F.2d 460 (5th Cir.1946); [FN8] *Brown v. Baskin*, 78 F.Supp. 933 (D.S.C.1948).

FN8. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent the decisions of the former Fifth Circuit issued before October 1, 1981.

In House Report 291, in which the House Judiciary Committee recommended passage of the provision giving the Attorney General the right to enforce the Voting Rights Act, the Committee first stated that the bill's purpose was "to provide means of *further* securing and protecting the civil rights of persons within the jurisdiction of the United States." H.R.Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 1966 (emphasis added). The Committee also noted that "[s]ection 1983 ... has been used [by individuals] to enforce ... section 1971." H.R.Rep. No. 85-291, *reprinted in* 1957 U.S.C.C.A.N. at 1977. Nothing in the Report suggests that the Committee intended the provision granting the Attorney General authority to bring suit to foreclose the continued use of § 1983 by individuals. In fact, the Committee noted: Th[e] right to vote ... is ... the foundation of our representative form of Government. It is the sole means by which the principle of consent of the governed as the source of governmental authority is made a living thing. Deprivation of the right to vote is the first step on the road to tyranny and dictatorship.... [T]he sovereign ... must preserve this fundamental and basic right against any and all unlawful interference. That the proposal of this section does that very thing is clear.

H.R.Rep. No. 85-291, *reprinted in* 1957 U.S.C.C.A.N. at 1977. This language demonstrates an intense focus on protecting the right to vote and does not support the conclusion that Congress meant merely to substitute one

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form of protection for another. We agree with Appellants that it is highly unlikely that in "enacting civil rights legislation for the first time since the Reconstruction era [Congress] would simultaneously withdraw existing protection" from § 1971.

Furthermore, in *Morse*, dealing with the provision of Voting Rights Act prohibiting the use of a poll tax, the Supreme Court found that a private right of action had not been foreclosed even though the enforcement scheme of the Voting Rights provision at issue gave the Attorney General the right to sue for violations and was more complete than that of § 1971. See *Morse*, 517 U.S. at 193, 116 S.Ct. at 1192-93.

Appellants also point out that in 1957, in what is now § 1971(d), Congress removed procedural roadblocks to suits under § 1971 by specifying that there was no requirement that a party exhaust judicial or administrative remedies before bringing suit. Appellants argue that this language could not have applied to the Attorney General and thus was meant to "remove[] roadblocks for the previously authorized private rights of action under § 1971." We agree.

We conclude that neither § 1971's provision for enforcement by the Attorney General nor Congress's failure to provide for a private right of action expressly in § 1971 require the conclusion that Congress did not intend such a right to exist. Thus, we hold that the district court erred by finding that Congress's provision for enforcement by the Attorney General in § 1971(c) precluded continued enforcement of § 1971 by a private right of action under § 1983.

The district court's finding was dispositive on the issue of whether the rights guaranteed by the Voting Rights Act may be enforced by a private right of action under § 1983. *Blessing*, 520 U.S. at 341, 117 S.Ct. at 1360 (noting that

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even if a statute creates an individual right, there is still no private right of action if Congress intended to "foreclose[] a remedy under § 1983 ... by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983"). Thus, the district court did not need to determine whether § 1971 created enforceable individual rights. Because we conclude that the district court's finding that § 1971's provision for enforcement by the Attorney General precluded private enforcement was error, we must apply the *Gonzaga/Blessing* analysis to § 1971 to determine whether the statute creates rights enforceable by individuals under § 1983.

As discussed above, under *Gonzaga*, we must first ask whether the statute contains "explicit right- or duty-creating language." 536 U.S. at 284 n. 3, 122 S.Ct. at 2276 n. 3 (internal quotations omitted); see also *Alexander v. Sandoval*, 532 U.S. 275, 286-89, 121 S.Ct. 1511, 1519-21, 149 L.Ed.2d 517 (2001) (noting that whether or not a statute creates an implied private right of action depends on Congress's intent, which must be determined by looking first to the text itself). Section 1971 states, "No person acting under color of law shall ... deny the right of any individual to vote in any election because of an [immaterial]-error or omission on any record or paper relating to any application, registration, or other act requisite to voting...." 42 U.S.C. § 1971(a)(2)(B). This language is clearly analogous to the right-creating language cited by the Supreme Court in *Gonzaga*, 536 U.S. at 284 n. 3, 122 S.Ct. at 2276 n. 3, discussed above. The subject of the sentence is the person acting under color of state law, but the focus of the text is nonetheless the protection of each individual's right to vote.

Next, as required by *Blessing*, the statute clearly provides rights which are specific and not amorphous. The statute protects an individual's right to vote; specifically, *1297 the statute forbids a person acting under color of law

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to disqualify a potential voter because of his or her failure to provide unnecessary information on a voting application.

Finally, the language of the statute is mandatory rather than precatory: "*No person acting under color of law shall ... deny the right of any individual to vote....*" 42 U.S.C. § 1971(a)(2)(B) (emphasis added).

Thus, we hold that the provisions of section 1971 of the Voting Rights Act may be enforced by a private right of action under § 1983.

F. Whether the disclosure of his or her SSN is "material" in determining whether a person is qualified to vote under Georgia law for purposes of the Voting Rights Act.

Section 1971(a)(2)(B) of the Voting Rights Act is often referred to as "the materiality provision," and, as discussed above, requires that no person be denied the right to vote "because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 42 U.S.C. § 1971(a)(2)(B). Cox argues that because Georgia's Voter Registration Form requires that potential voters supply their SSNs, they are not "qualified under State law to vote" unless they have supplied their SSNs and thus filled out the Form. However, Appellants point out that according to the Form and O.C.G.A. § 21-2-216, the only *qualifications* for voting in Georgia are U.S. Citizenship, Georgia residency, being at least eighteen years of age, not having been adjudged incompetent, and not having been convicted of a felony. O.C.G.A. § 21-2-216 (1998).

Because the district court found that section 1971 of the Voting Rights Act did not provide for a private right of

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action, the court did not reach the issue of whether the disclosure of a person's SSN is "material" in determining whether he or she is qualified to vote under Georgia law for purposes of § 1971. Thus, we remand this issue to the district court to address in the first instance.

V. CONCLUSION

A. Privacy Act Claims

In summary, we hold that the rights conferred by the Privacy Act may be vindicated by a private suit under § 1983. We also hold that Congress did not exceed its authority in enacting the Privacy Act.

We remand to the district court the issues of whether Georgia qualifies for the "grandfather" exception of section 7(a)(2)(B) of the Privacy Act and whether Georgia's Voter Registration Form complies with the notice requirements of section 7(b) of the Privacy Act.

B. Voting Rights Act Claims

We hold that the district court erred in finding that section 1971 of the Voting Rights Act does not provide for enforcement by a private right of action under § 1983. We remand to the district court the issue of whether the disclosure of a potential voter's SSN is "material" in determining whether he or she is qualified to vote under Georgia law for purposes of section 1971 of the Voting Rights Act.

REVERSED and REMANDED.

APPENDIX F

United States District Court,
W.D. Michigan, Southern Division.

Melissa Ann BARBER, Steven Barber,
David Hall, Paul Jensen, Jennifer Kula-Hauk,
Steven Pettit, Troy Huizing,
Plaintiffs,

v.

William OVERTON, Director of the
Michigan Department of Corrections, in his
official capacity; Fritz Jackson, Lorenzo Lowery,
and Bruce Sibert, in their individual and
official capacities,

Defendants.

No. 1:03-CV-329.

Aug. 20, 2005.

Andrew Nickelhoff, Marshall J. Widick, Sachs Waldman
PC, Detroit, MI, H. Rhett Pinsky, Pinsky Smith & Fayette,
LLP, Grand Rapids, MI, for Plaintiffs.

A. Peter Govorchin, Frank J. Monticello, Linda M. Olivieri,
Michigan Department Attorney General, Lansing, MI, for
Defendants.

MEMORANDUM OPINION AND ORDER

BELL, Chief J.

*1 This matter is before the Court on Defendants' motion to tax costs pursuant to Fed. R. Civ. P. 54(d). On June 21, 2005, the Court granted Defendants' motion for summary judgment, dismissing Plaintiff's § 1983 claims, state constitutional claims, and state law tort claims against all Defendants. Thereafter, Defendants' filed the present motion to tax costs in the amount of \$3,538.44. Plaintiffs'

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filed a timely objection. For the reasons stated below, the Court denies Defendants' motion to tax costs.

I.

Rule 54(d) of the Federal Rules of Civil Procedure provides, "[e]xcept when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs...." This language "creates a presumption in favor of awarding costs, but allows denial of costs at the discretion of the trial court." *White & White, Inc. v. Am. Hosp. Supply Corp.*, 786 F.2d 728, 730 (6th Cir.1986). Thus, the unsuccessful party has the burden of overcoming the presumption favoring an award of costs. *Soberay Mach. & Equip. Co. v. MRE Ltd., Inc.*, 181 F.3d 759, 770 (6th Cir.1999); *Goostree v. Tennessee*, 796 F.2d 854, 863 (6th Cir.1986) ("[I]t is incumbent upon the unsuccessful party to show circumstances sufficient to overcome the presumption favoring an award of costs to the prevailing party."). The Court may deny costs to the prevailing party if "it would be inequitable *under all the circumstances in the case* to put the burden of costs upon the losing party." *White & White, Inc.*, 786 F.2d at 730 (quoting *Lichter Foundation, Inc. v. Welch*, 269 F.2d 142, 146 (6th Cir.1959)) (emphasis in original).

In *White & White, Inc.*, the Sixth Circuit identified certain circumstances in which a denial of costs is a proper exercise of discretion: 1) where taxable expenditures are unnecessary or unreasonably large; 2) where the prevailing party should be penalized for unnecessarily prolonging trial or injecting unmeritorious issues; 3) where the prevailing party's recovery is so insignificant that the judgment amounts to a victory for the defendant; and 4) cases that are close and difficult. 786 F.2d at 730. None of these circumstances apply to this case. The court also identified other relevant factors including good faith of the losing party, the propriety with which the losing party

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conducts the litigation, whether the prevailing party benefitted from the case, whether the public benefitted from the case, and whether the award of costs will have a chilling effect on other litigants. *White & White, Inc.*, 786 F.2d at 730-31; see also *Rosser v. Pipefitters Union Local 392*, 885 F.Supp. 1068, 1071-72 (S.D.Ohio 1995).

In this case, Plaintiffs undoubtedly filed and prosecuted this matter in good faith and properly conducted themselves throughout the litigation. This alone, however, is insufficient to deny costs. *Id.* at 730 (citing *Coyne-Delany v. Capital Development Board of Illinois*, 717 F.2d 385, 390 (7th Cir.1983)). In addition to Plaintiffs' good faith, the Court also finds that an award of costs could have a chilling effect upon other civil rights litigants. See *Rosser*, 885 F.Supp. at 1072. Although the Court found that Defendants' were entitled to qualified immunity on Plaintiffs' constitutional claims, Plaintiffs' have suffered a significant degree of harm from the release of their private personal information to the prisoner population of the Ionia Maximum Security Correctional Facility. Due to the significance of the interests at stake, an award of costs may have a chilling effect on civil rights litigants seeking to vindicate their privacy interests. Based upon Plaintiffs good faith in bringing and prosecuting the suit, their reasonable conduct throughout the proceeding, and the likelihood of a chilling effect upon civil rights litigants, the Court denies Defendants' motion to tax costs. Accordingly,

IT IS HEREBY ORDERED that Defendant's motion to tax costs (Docket # 124) is DENIED.

W.D.Mich., 2005.
Barber v. Overton

Slip Copy, 2005 WL 2018134 (W.D.Mich.)

DEC 16 2003

OFFICE OF THE CLERK

No. 05-554

**In the
Supreme Court of the United States**

DANIEL A. SCHMITT,

Petitioner,

v.

CITY OF DETROIT, LORETTA NEAL, MARK VANN,
JAMES FLORKOWSKI, BRYANT JENKINS,
AND T.W. GRAPHICS,

Respondents.

**On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Sixth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

LINDA D. FEGINS

Counsel of Record

CITY OF DETROIT LAW DEPARTMENT
660 WOODWARD AVENUE
SUITE 1650
DETROIT, MI 48226
(313) 237-3022

Counsel for Respondents

COUNTER-QUESTION PRESENTED FOR REVIEW

Where Petitioner failed to meet the statutory criteria of The Privacy Act of 1974, 5 U.S.C. §552a, of proving that he was adversely affected by an intentional or willful violation of the Act by the City and the Social Security Act, 42 U.S.C. §405(c)(2)(C)(i), which authorizes the use of social security numbers, serves as an alternative ground for the Sixth Circuit decision, Did the Sixth Circuit reach the right result because Petitioner is not entitled to relief under the Privacy Act, and therefore, the purported conflict between the Sixth and Eleventh Circuits is immaterial and does not present an issue of sufficient importance to warrant review by this Court?

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S. Rep. No. 93-1183, 93d Congress 2d Sess.
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SUPPLEMENT TO STATUTORY PROVISIONS INVOLVED

The statutory authority to use the social security numbers for income tax purposes is pursuant to the Social Security Act, 42 U.S.C. § 405(c)(2)(C)(i) and (v) which provides as follows:

(c) Records of wages and self-employment income

* * *

(2)

* * *

(C)

(i) It is the policy of the United States that any State (or political subdivision thereof) may, in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law within its jurisdiction, utilize the social security account numbers issued by the Commissioner of Social Security for the purpose of establishing the identification of individuals affected by such law, and may require any individual who is or appears to be so affected to furnish to such State (or political subdivision thereof) or any agency thereof having administrative responsibility for the law involved, the social security account number (or numbers, if he has more than one such number) issued to him by the Commissioner of Social Security.

* * *

(v) If and to the extent that any provision of Federal law heretofore enacted is inconsistent with the policy set forth in clause (i), such provision shall, on and after the date of the enactment of this subparagraph [enacted Oct. 4, 1976], be null, void, and of no effect. If and to the extent that any such provision is inconsistent with the requirement set forth in clause (ii), such provision shall, on and after the date of the enactment of such subclause, be null, void, and of no effect.

SUPPLEMENT TO STATEMENT OF FACTS

The City of Detroit (hereinafter City) imposes and collects a tax on income from residents of the City and non-residents who work in the City or derive income from business and entertainment activities in the City. The tax is imposed under the City's Income Tax Ordinance, 1984 Detroit City Code § 18-10-1 et seq. The ordinance is authorized by the State of Michigan's City Income Tax Act, MCL 141.501 et seq.

Under MCL 141.642, and 1984 Detroit City Code § 18-10-11, a City income tax return shall set forth the number of exemptions, place of residence, place of employment and "other pertinent information as shall reasonably be required." Included in the "other pertinent information" on a City tax return is a person's social security account number. The City of Detroit, like the State of Michigan, and the federal government, uses social security numbers to identify taxpayers, which is a widespread practice allowed by the Internal Revenue Code, 26 U.S.C. § 6109(d). Similar to the federal and state governments, which send tax return forms by mail to persons in their database, the City has a database of names, addresses, and social security numbers based on taxpayer information that has been provided to the City by the

taxpayer. (R.30, Tr.3/24/2003 pgs.5,7-9;Apx. Pg. 289, 291-293).

The City argued in the district court and in the Sixth Circuit Court of Appeals that pursuant to the Social Security Act, 42 U.S.C. § 405(c)(2)(C)(i), the notice provision of § 7(b) of the Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896, 5 U.S.C. § 552a (2004) (hereinafter Privacy Act) do not apply to the administration of any tax law such as the City's Income Tax Ordinance and Michigan's City Income Tax Act. (R.30; R.9; Apx. pgs. 93, 102-103,289,291-293).

Petitioner Schmitt admitted that he was not denied any right or privilege as a result of the mailing label mishap. Schmitt v. City of Detroit, 267 F.Supp.2d 718 (E.D. Mich. 2003); Pet. Apx. C, p 22a fn 6.

The district court ruled that Petitioner failed to prevail on a claim arising under the Privacy Act because he failed to show that the City's actions had an adverse effect on Schmitt and that the City willfully or intentionally violated § 7b of the Privacy Act. Schmitt, supra; Pet. Apx. C, p 22a. Therefore, even if Plaintiff had an implied cause of action under the Privacy Act, Plaintiff failed to meet the statutory criteria or the Sixth Circuit test for entitlement to damages pursuant to the Privacy Act. Id.

Plaintiff agreed to dismiss the federal claims against all the individual Defendants. Id., Pet Apx. C, p.15a. The Court then dismissed the individual Defendants with prejudice. Plaintiff provided no evidence of damages.